

United States
Circuit Court of Appeals

For the Ninth Circuit. 14

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Transcript of Record.

Upon Petition to Review an Order of the United States
Board of Tax Appeals.

FILED

AUG 12 1931

PAUL P. O'BRIEN,
CLERK

United States
Circuit Court of Appeals
For the Ninth Circuit.

J. A. McPHERSON,

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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[1*] DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

APPEARANCES.

For Taxpayer: HERMAN WEINBERGER, Esq.

For Commissioner: J. E. MATHER, Esq.

DOCKET ENTRIES.

1927.

Apr. 18—Petition received and filed. Taxpayer notified.

Apr. 20—Copy of petition served on General Counsel.

Jun. 18—Answer filed by General Counsel.

Jun. 27—Copy of answer served on taxpayer. Circuit Calendar.

1930.

Mar. 15—Hearing set May 19, 1930, San Francisco, California.

Apr. 18—Motion for leave to amend answer, embodying amendment filed by General Counsel. 4/18/30 granted.

*Page-number appearing at the top of page of original certified Transcript of Record.

- May 23—Hearing had before Mr. Seawell on merits. Briefs due 9/15/30. Amendment to petition filed at hearing. Stipulation of facts filed.
- Jul. 8—Transcript of hearing 5/19/23 filed.
- Jul. 14—Brief filed by taxpayer. See 26,800.
- Sep. 12—Motion for extension 10/15/30 to file brief filed by General Counsel. 9/13/30 granted.
- Oct. 15—Brief filed by General Counsel.
- 1931.
- Feb. 26—Findings of fact and opinion rendered. Mr. Seawell, Div. 4. Judgment will be entered for Commissioner. See 26,800.
- Feb. 28—Decision entered, Div. 4
- Mar. 9—Motion to review decision by whole Board filed by taxpayer. Memorandum in support.
- Mar. 12—Order denying motion that decision be reviewed by the Board, entered.
- Jun. 9—Supersedeas bond in the amount of \$4,000.00 approved and ordered filed.
- Jun. 9—Petition for review by U. S. Circuit Court of Appeals (9) with assignments of error filed by taxpayer.
- Jun. 9—Proof of service filed.
- Jun. 9—Statement evidence lodged.
- Jun. 30—Notice of hearing on approval of statement of evidence 7/15/31 filed.
- Jul. 15—Hearing had before Mr. Smith, Div. 5, on approval of statement of evidence. Continued two weeks.

Jul. 15—Order of continuance to July 29, 1931, on approval of statement of evidence, entered.

Jul. 22—Praecipe filed. No objections by General Counsel.

[2] Filed April 18, 1927. U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION.

The above-named petitioner hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his deficiency letter, symbols IT:E:RR:280-60D CTR., dated February 21, 1927, and as the basis of his proceeding, alleges as follows:

1. That petitioner is an individual and resides at 765-Third Avenue, San Francisco, California, and his postoffice address is 25 Taylor Street, San Francisco, California.

2. The notice of deficiency, copy of which is hereto attached and made a part hereof, and marked

Exhibit "A," was mailed to petitioner on February 21, 1927.

3. The taxes in controversy are income and profits taxes for the calendar year 1919, in the sum of \$2,000.00 heretofore assessed against Leighton's Inc. (designated in said deficiency letter as Leighton's Incorporated), a dissolved corporation, and sought in said letter to be assessed against petitioner as transferee of assets of said Leighton's [3] Inc., and the whole amount thereof, to wit: the sum of \$2,000.00 is in controversy.

4. The determination of said tax set forth in said notice of deficiency hereinbefore referred to, is based upon the following errors:

I. Respondent erred in that the Revenue Act of 1926, and particularly Section 280 thereof, in so far as it purports to make a transferee of property of a corporation liable for taxes due from such corporation, is not retroactive, so as to authorize the assessment of said deficiency against the petitioner.

II. Respondent erred, in that said proposed assessment of said deficiency against petitioner is barred by the provisions of the Statute of Limitations contained in the Revenue Laws of the United States, and in particular by Section 1109 of the Revenue Act of 1926.

III. Respondent erred, in that said proposed assessment of said deficiency against petitioner is barred by reason of the fact that no valid lien exists against any property from Leighton's Inc., a dissolved corporation, and

also by reason of the fact that no valid assessment of said tax claimed to be due from Leighton's Inc., a dissolved corporation, exists, or any assessment exists upon which can be predicated said proposed assessment of said deficiency against petitioner.

IV. Respondent erred, in that there is no liability, in law or in equity, of petitioner for any tax due from Leighton's Inc., a dissolved corporation, or as transferee of property of said Leighton's Inc., as proposed in said notice of deficiency.

V. Respondent erred, in making said proposed assessment of said deficiency against petitioner, in that no property was received by petitioner as transferee of Leighton's Inc., excepting a liquidating dividend of \$2,000.00, paid prior to notice of assessment against said Leighton's Inc.

VI. Respondent erred, in holding petitioner liable for any tax heretofore assessed against Leighton's Inc., a dissolved corporation.

[4] VII. Respondent erred, in making said proposed assessment of said deficiency against petitioner, in that the same is barred by Section 250 of the Revenue Act of 1918.

VIII. Respondent erred, in that the Revenue Act of 1926, in so far as it provides or purports to provide for the assessment and/or collection of any income and/or profits taxes due from said Leighton's Inc. for the calendar year 1919 from petitioner, as transferee, as provided in

Section 280 of said Act, deprives petitioner of his property without due process of law, and denies to petitioner the protection of the law, contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

5. The facts upon which the petitioner relies as a basis of this proceeding, are as follows:

I. Leighton's Inc. (called Leighton's Incorporated in the said notice of deficiency hereinbefore referred to) was incorporated as a corporation under the laws of the State of California, on March 29th, 1919, and operated a cafeteria business in Oakland, California, from said date until the early part of the year 1920. During said period it filed income tax returns with the Collector of Internal Revenue at San Francisco, California, showing the total earnings derived from said business, and on May 15, 1920, by order of the Superior Court of the State of California, in and for the County of Alameda, said Corporation was dissolved and went out of existence. Prior to its dissolution its assets, having a cash value of \$15,000.00, were sold for the sum of \$15,000.00 in cash, which was thereafter, and following the dissolution of said corporation, distributed to the various stockholders thereof as their interests appeared.

II. On April 7, 1923, the Commissioner of Internal Revenue addressed a letter to Leighton's Inc., informing said dissolved corporation

of its intention to assess additional taxes for the calendar year 1919; thereafter the trustees of said dissolved corporation filed an appeal with the Commissioner of Internal Revenue, which was granted in part and denied in part, and finally, on January 25, 1926, additional income and profits tax in the sum of \$7,986.53 was assessed against said Leighton's Inc., a dissolved corporation, for the calendar year 1919.

[5] III. At the time of the dissolution of said Leighton's Inc., its issued and outstanding capital stock consisted of 15,000 shares of the par value of \$1.00 each, of which petitioner owned and held 2,000 shares, and no more; that following the dissolution of said corporation petitioner received as a final liquidating dividend, his pro rata of the assets of said Leighton's Inc., to-wit: the sum of \$2,000.00, consisting of cash as aforesaid.

IV. At no time prior to April 7, 1923, was said Leighton's Inc., or any of its officers or stockholders, notified of any claim of the United States for additional taxes for the said calendar year 1919 against said corporation and as of the date of the dissolution of said corporation, no assessment of additional income or profits taxes for said calendar year 1919 had been made against said corporation, nor had any lien been filed against said properties, and the properties were sold as aforesaid, for a full, fair and adequate consideration to petitioner, and

has since been used up, worn out and abandoned.

V. That a return of income for income and profit tax purposes was filed before June 1, 1920, by Leighton's Inc. with the Collector of Internal Revenue at San Francisco for the calendar year 1919, showing the income and expenses of said Leighton's Inc. in the manner required by law, and no claim of any kind or character was made by the United States, or any officer thereof, against petitioner, for any income or profits tax growing out of the operation of Leighton's Inc. for the calendar year 1919, until February 21, 1927, or more than five years after the return of Leighton's Inc. for the calendar year 1919 was filed.

VI. That all other matters of fact essential for a redetermination of this appeal are now of record in the matter of the income and profits tax.

WHEREFORE, petitioner prays:

(1) That this Board may hear this petition and appeal in San Francisco, California;

(2) And after such hearing make its order, judgment, [6] decree, decision and award—

(a) that petitioner is not liable to the United States of America for income and/or profits taxes under the Revenue Act of 1918, and/or 1926, as transferee of properties of Leighton's Inc. (also called Leighton's Incorporated) or otherwise; and

(b) Cancelling and annulling said proposed assessment of said deficiency as set forth in said Exhibit "A"; and

(3) For such other and further relief from said proposed assessment of deficiency, as to this Board may seem meet and proper in the premises, and for general relief.

HERMAN WEINBERGER.
(HERMAN WEINBERGER),
Counsel for Petitioner,
1134 Merchants Exchange Building,
San Francisco, California.

[7] State of California,
City and County of San Francisco,—ss.

J. A. McPherson, being duly sworn, says:

That he is the petitioner above named; that he has read the above and foregoing petition, or had the same read to him, and that he is familiar with the statements contained therein, and that the facts stated are true, except those facts stated to be upon information and belief, and these facts he believes to be true.

JAS. A. McPHERSON.

Subscribed and sworn to before me this 13th day of April, 1927.

[Seal] KATHRYN E. STONE,
Notary Public in and for the City and County of
San Francisco, State of California.

[8] Form NP-2

EXHIBIT "A."

TREASURY DEPARTMENT,

Washington.

Office of

Commissioner of Internal Revenue.

IT:E:RR:280-60D.

CTR.

February 21, 1927.

Mr. J. A. McPherson,

c/o Leighton Industries,

25 Taylor Street,

San Francisco, California.

Sir:

As provided in Section 280 of the Revenue Act of 1926, there is proposed for assessment against you the amount of \$2,000.00, constituting your liability as a transferee of the assets of Leighton's Incorporated, 1212 Broadway, Oakland, California, for unpaid income and profits taxes in the amount of \$7,986.53 assessed against Leighton's, Incorporated, for the calendar year 1919, plus any accrued penalty or interest, as shown on the attached statement.

In accordance with the provisions of Section 274 of the Revenue Act of 1926, you are allowed 60 days from the date of mailing of this letter within which to file a petition for the redetermination of this deficiency. Any such petition must be addressed to the United States Board of Tax Appeals, Earle Building, Washington, D. C., and must be mailed in time

to reach the Board within the 60-day period, not counting Sunday as the sixtieth day.

Where a taxpayer has been given an opportunity to file a petition with the United States Board of Tax Appeals and has not done so within the 60 days prescribed and an assessment has been made, or where a taxpayer has filed a petition and an assessment in accordance with the final decision on such petition has been made, the unpaid amount of the assessment must be paid upon notice and demand from the Collector of Internal Revenue. No claim for abatement can be entertained.

If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute a waiver of your right to file a petition with the United States Board of Tax Appeals on the inclosed Form A and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7.

In the event that you acquiesce in a part of the determination, the waiver should be executed with respect to the items which you agree.

Respectfully,
D. H. BLAIR,
Commissioner.

By C. R. NASH,
Assistant to the Commissioner.

Inclosures :

Statement.

Form A.

[9] Mr. J. A. McPherson, Transferee.

STATEMENT.

IT:E:RR:280-60D.

CTR.

In re: LEIGHTON'S, INCORPORATED,
c/o Mr. Wm. Weinberger,
1237 Merchants Exchange Bldg.,
Los Angeles, California.

1919.

Deficiency in tax—\$7,986.53.

You are advised that after careful consideration and review, your application under the provisions of Section 327 for assessment of your profits tax as prescribed by Section 328 of Revenue Act of 1918 has been allowed. Your profits tax is based upon a comparison with a group of representative concerns which in the aggregate may be said to be engaged in a like or similar trade of business to that of your company.

The result of the audit under the above-mentioned provisions is as follows:

| | | |
|--------------------------------------|-------------|----------|
| Net income Bureau letter Jaunary 25, | | |
| 1924 | \$30,641.96 | |
| Profits tax (Section 328) | \$ 5,691.48 | |
| Net income | \$30,641.96 | |
| Less: | | |
| Profits tax | \$5,691.48 | |
| Exemption | 2,000.00 | 7,691.48 |
| | | <hr/> |
| Balance taxable at 10% | \$22,950.48 | |

| | |
|-------------------------------|-------------|
| Tax at 10 % | 2,295.05 |
| <hr/> | |
| Total tax assessable | \$ 7,986.53 |
| Tax previously assessed | None |
| <hr/> | |
| Deficiency | \$ 7,986.53 |

[10] Filed Jun. 18, 1927. United States Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 26,801.

J. A. McPHERSON (Transferee—LEIGHTON'S INC.),

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ANSWER.

The Commissioner of Internal Revenue, by his Attorney, A. W. Gregg, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer, admits, denies and alleges as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

5. Admits that Leighton's Inc. was incorporated as a corporation under the laws of the State of California on March 29, 1919, and operated a cafeteria business in Oakland, California, from said date until the early part of the year 1920 as alleged in subparagraph (I) of paragraph 5 but denies each and every other allegation of fact contained in the said subparagraph (I) of paragraph 5 of the petition. Denies each and every other allegation of fact contained in paragraph 5 of the petition.

Denies generally and specifically each and every allegation of fact contained in the petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the Commissioner's recommendation be approved and that the petition be dismissed and the appeal denied.

A. W. GREGG,
General Counsel,
Bureau of Internal Revenue.

Of Counsel:

ARTHUR H. FAST,
Special Attorney,
Bureau of Internal Revenue.

AHF:ELC:fem.

[11] Filed Apr. 18, 1930. United States Board of Tax Appeals.

Granted Apr. 18, 1930.

(Signed) LOGAN MORRIS,
Member U. S. Board of Tax Appeals.

United States Board of Tax Appeals.

26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDED ANSWER.

Comes now the Commissioner of Internal Revenue by and through his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, and asks leave to file this, his amended answer to the petition filed herein, and for such amended answer admits, denies, and alleges:

1, 2, 3. Admits the allegations contained in paragraphs 1, 2, and 3 of said petition.

4. Denies each and every allegation of error contained in paragraph 4 of said petition.

5. (I), (II). Admits the allegations contained in paragraphs (I) and (II) of paragraphs 5 of said petition.

5. (III). Admits that at the time of dissolution of the said Leighton's, Incorporated, the total outstanding stock consisted of 15,000 shares, of which

the petitioner owned and held at least 2,000 shares; that following the dissolution of said corporation the said petitioner received as a liquidating dividend his *pro rata* of the assets of Leighton's, Incorporated.

5. (IV), (V). Denies each and every allegation contained in subparagraphs (IV) and (V) of paragraph 5 of said petition.

Further answering, respondent alleges:

[12] That the tax assessed against the said Leighton's, Incorporated, referred to in subparagraph (II) of paragraph 5 has not been paid and still remains outstanding and unpaid. That subsequent to the date the said taxes became due and payable the said Leighton's, Incorporated, distributed all of its property and assets to its stockholders in liquidation of its capital stock and thereafter discontinued business and dissolved. That in the said distribution the petitioner herein received property and assets having a value in excess of the amount of taxes herein in controversy, plus interest as provided by law.

WHEREFORE, it is prayed that the Commissioner's determination be in all things approved.

(Signed) C. M. CHAREST.

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

Of Counsel:

J. E. MATHER,

E. A. TONJKS,

Special Attorneys,

Bureau of Internal Revenue.

vgk.

4/15/30.

[13] Filed at hearing May 19, 1930. U. S.
Board of Tax Appeals.

United States Board of Tax Appeals.

DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

AMENDMENT TO PETITION.

Now comes the petitioner above named and amends his petition on file herein by amending and changing paragraph 4 thereof to read as follows:

4. The determination of said tax set forth in said notice of deficiency hereinbefore referred to, is based upon the following errors:

I. Respondent erred, in that the Revenue Act of 1926, and particularly Section 280 thereof, in so far as it purports to make the petitioner, as transferee of the property of a corporation, liable for taxes due from such cor-

poration, is contrary to the Constitution of the United States and law, in that it deprives petitioner of due process of law and equal protection of law contrary to the Fifth Amendment, vests in the Commissioner of Internal Revenue and/or the Board of Tax Appeals judicial power contrary to the provisions of Article III, deprives petitioner of the right to a jury trial contrary to the provisions of the Seventh Amendment, and is retroactive and operates as a forfeiture of property contrary to the provisions of Section 9 of Article I of said Constitution.

II. Respondent erred, in that any extraction of money from the petitioner as such transferee, predicated in whole or in part upon an assessment against [14] Leighton's, Incorporated, must be predicated upon the enforcement of a lien against the assets of said Leighton's, Incorporated, and neither at the time of said assessment against said Leighton's, Incorporated, nor since that time was there a lien, nor did Leighton's, Incorporated, have any assets of any kind or character.

III. In so far as respondent seeks to recover moneys from the petitioner as such transferee based upon the enforcement of a lien against the assets of Leighton's, Incorporated, the proceeding, and the whole thereof is void and unconstitutional, in that it violates Article III and the Seventh Amendment of said Constitution.

IV. Respondent erred, in that there is no liability in law or in equity of petitioner for any tax due from Leighton's, Incorporated, or as transferee of property from said Leighton's, Incorporated.

V. Respondent erred in making said proposed amendment of said deficiency against petitioner, in that the same is barred by the provisions of the Revenue Acts of 1918, 1921, 1924 and 1926, and further, the liability for said tax, long since and prior to the filing of said proceeding, was extinguished under the Revenue Acts of the United States.

WHEREFORE, petitioner prays that this Board may hear this petition and appeal in San Francisco, California, and that after such hearing it make its judgment, decree and award that petitioner is not liable to the United States for any tax or taxes whatsoever as transferee of the property of Leighton's, Incorporated, or otherwise, and for such other and further relief as to the Board may be meet and proper in the premises.

HERMAN WEINBERGER,
Attorney for the Petitioner.

[15] State of California,
City and County of San Francisco,—ss.

J. A. McPherson, being first duly sworn deposes and says: That he has read the above and foregoing amendment to petition and knows the contents thereof; that the same is true of his own knowledge except as to matters therein stated on information

and belief, and as to such matters he believes it to be true.

JAS. A. McPHERSON,

Subscribed and sworn to before me this 17th day of May, 1930.

[Seal] KATHRYN E. STONE,
Notary Public in and for the City and County of
San Francisco, State of California.

Taken from transcript of hearing, May 19 & 23d, 1930.

General denial of the errors in the amended petition made by counsel for respondent.

[16] 22 B. T. A. —.

United States Board of Tax Appeals.

DOCKET Nos. 26800, 26801, 26802, 26803, 26805,
26806, 26808, 26864.

Promulgated February 26, 1931.

R. W. CROSMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

G. CARRAVAS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

R. CLEVELAND,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

J. H. LEIGHTON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ELIZABETH CLARRIDGE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

P. LEVINTICH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

A. RUDOLPH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

FINDINGS OF FACT AND OPINION.

A corporation filed its return for 1919 on March 15, 1920, and prior to the expiration of the five-year period for making assessments on account thereof a waiver was filed which extended the period for assessment to December 31, 1925. On September 29, 1925, a deficiency notice was mailed to the corporation and on February 21, 1927, notices were mailed to the petitioners, advising them of their liability under section 280 of the Revenue Act of 1926 as transferees of the aforesaid corporation. Held, that the assessment of the additional tax of the corporation against the petitioners is not barred.

HERMAN WEINBERGER, Esq., and WALTER
C. FOX, Esq., for the Petitioners.

J. E. MATHER, Esq., for the Respondent.

A true copy.

[Seal]

Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[17] These proceedings, which were consolidated for hearing and decision, involve the liability of the petitioners as transferees of Leighton's, Inc., under the provisions of section 280 of the Reve-

nue Act of 1926, on account of an additional income and profits tax of \$7,986.53 which was assessed against that corporation for 1919. The amounts proposed for assessment against the petitioners are as follows:

| | |
|---------------------------|-----------|
| R. W. Crosman | \$ 100.00 |
| J. A. McPherson | 2,000.00 |
| G. Carravas | 205.00 |
| R. Cleveland | 250.00 |
| J. H. Leighton | 7,986.53 |
| Elizabeth Clarridge | 250.00 |
| P. Levintich | 200.00 |
| A. Rudolph | 500.00 |

The errors assigned relate to the constitutionality of section 280 and the statute of limitations.

FINDINGS OF FACT.

Leighton's, Inc., was organized as a California corporation on March, 29, 1919, and operated a cafeteria business in Oakland, Calif., from that date until the early part of 1920. On June 25, 1920, the said corporation was regularly dissolved by a court decree and no liquidators were appointed in said decree of dissolution.

At the time of dissolution the corporation had outstanding 15,000 shares of capital stock of a par value of one dollar per share, and of such stock the petitioners in these proceedings held the following amounts:

| | |
|--------------------------|------------|
| [18] R. W. Crosman | 100 shares |
| J. A. McPherson | 2,000 " |
| G. Carravas | 205 " |
| R. Cleveland | 250 " |

| | | |
|---------------------------|-----|---|
| J. H. Leighton | 900 | “ |
| Elizabeth Clarridge | 250 | “ |
| P. Levintich | 200 | “ |
| A. Rudolph | 500 | “ |

Prior to the dissolution of the corporation all of its assets were sold to J. H. Leighton for \$15,000 and upon dissolution the petitioners as stockholders received in liquidation the amounts shown below:

| | |
|---------------------------|-----------|
| R. W. Crosman | \$ 100.00 |
| J. A. McPherson | 2,000.00 |
| G. Carravas | 205.00 |
| R. Cleveland | 250.00 |
| J. H. Leighton | 900.00 |
| Elizabeth Clarridge | 250.00 |
| P. Levintich | 200.00 |
| A. Rudolph | 500.00 |

Prior to and at the time of its dissolution, the following individuals constituted its board of directors: J. H. Leighton, J. A. McPherson and Carl Barthel.

On March 15, 1920, the corporation filed a return for 1919 on Form 1065 (Partnership and Personal Service Corporation Return), such return being signed by J. H. Leighton and Jas. A. McPherson, as officers of the corporation. The following waiver was filed on March 6, 1925:

In pursuance of the provisions of existing Internal Revenue Laws Leighton's Inc., a taxpayer of San Francisco, California, and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making

any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year(s) 1919 under existing revenue acts, or under prior revenue acts. This waiver of the time for making any assessment as aforesaid shall remain in effect [19] until December 31, 1925, and shall then expire except that if a notice of deficiency in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said Board.

LEIGHTON'S INC., a Dissolved Corporation,
Taxpayer.

By J. H. LEIGHTON,
JAS. A. McPHERSON,
CARL BARTHEL,
Surviving Trustees.

D. H. BLAIR,
Commissioner.

WB.

On September 29, 1925, the Commissioner mailed a deficiency notice to the corporation, showing a deficiency in income and profits tax for 1919 as determined under sections 327 and 328 of the Revenue Act of 1918 of \$7,986.53. The foregoing de-

iciency was assessed in January, 1926, and has not been paid. On February 21, 1927, the Commissioner mailed notices to the petitioners advising them of their liability under section 280 of the Revenue Act of 1926 for the additional tax assessed against the corporation.

OPINION.

SEAWELL.—The errors assigned by the petitioners with respect to the constitutionality of section 280 of the Revenue Act of 1926 are [20] admitted by them to have been heretofore disposed of by the Board adversely to their position, though they do not admit the correctness of those decisions. *Henry Cappellini et al.*, 14 B. T. A. 1269; *Grand Rapids National Bank*, 15 B. T. A. 1166; *Annie G. Phillips et al., Executors*, 15 B. T. A. 1218; *affd.*, *Annie G. Phillips et al. vs. Commissioner*, 42 Fed. (2d) 177; and *Woodley Petroleum Co. et al.*, 16 B. T. A. 253.

The remaining issue is whether the statute of limitations has run in favor of the petitioners as transferees on account of the amounts now sought to be collected from them. The return of *Leighton's Inc.*, for 1919 was filed on March 15, 1920, and the statutory period for making assessment thereunder expired five years thereafter, or on March 15, 1925. (Section 250 (d) of the Revenue Act of 1921; section 277 of the Revenue Acts of 1924 and 1926.) No assessment was made prior to March 15, 1925, but on March 6, 1925, the waiver set forth in our findings was filed, purporting to extend the time for assessment to December 31,

1925. The petitioners, however, contend that such waiver is without force and effect for the reason that the corporation had been dissolved long prior to that time and the individuals who signed such waiver could not bind a corporation which was out of existence. Section 400 of the Civil Code of California provides in part as follows:

Directors to be trustees of dissolved corporation. Unless other persons are appointed by the court, the directors or managers of the affairs of a corporation at the time of its dissolution are trustees of the creditors and stockholders or members of the corporation dissolved,

[21] Powers and liabilities of trustees. And have full powers to settle the affairs of the corporation, collect and pay outstanding debts, sell the assets thereof in such manner as the court shall direct, and distribute the proceeds of such sales and all other assets to the stockholders. Such trustees shall have authority to sue for and recover the debts and property of the corporation, and shall be jointly and severally personally liable to its creditors and stockholders or members, to the extent of its property and effects that shall come into their hands.

The above provisions were in effect in 1920 when the corporation was dissolved and continued in effect until after the waiver here in question was filed. No time limit appears to have been provided in the statute upon the time during which the directors would act as trustees under the forego-

ing authority, nor is it contended that any such limitation existed. No liquidators were appointed in the decree of dissolution and the parties who signed the waiver were directors of the corporation prior to its dissolution. Under such circumstances, we fail to see why the parties who signed such waiver were not the proper parties to take such action and why the period for assessment is not extended thereby. The petitioner's argument seems to be that since under the laws of California there is no provision for continuing the existence of a corporation after its dissolution, no action can thereafter be taken in the name or on behalf of the corporation. But the proceedings now before us are not in the name of or on behalf of the corporation. What we are seeking to determine is the statutory period of limitation for assessment of the petitioner's liability for the tax for which the corporation was liable when dissolved. Who may appear to attack such attempted collection and who may ultimately [22] be required to pay such tax are entirely different questions. Certainly, it could hardly be said that because of the dissolution of the corporation the original statutory period of five years for assessment was thereby cut short or terminated, and yet some of the argument in their brief almost goes that far. If, as the state statute quoted above provides, the directors become trustees with full authority to settle the affairs of the corporation, we are of the opinion that included in such authority would be authority to sign a waiver of the character here in question, and that the

waiver so signed is valid to extend the time for assessment to December 31, 1925.

Prior to December 31, 1925, or on September 29, 1925, a deficiency notice was mailed on account of the dissolved corporation's tax liability here in question. Apparently, no petition was filed on account of such deficiency notice, though in any event, under the express terms of the waiver, since the deficiency notice was mailed prior to the expiration of such waiver, the period for assessment against the dissolved corporation (transferor in this proceeding) did not expire before March 1, 1926, or subsequent to the passage of the Revenue Act of 1926. We have heretofore held that where the period of limitations for assessment against the taxpayer or transferor expired after the enactment of the Revenue Act of 1926, the Commissioner had the additional year provided by section 280 (b) (1) of the Revenue Act of 1926 within which to proceed against the transferee. *Louis Costanzo*, 16 B. T. A. 1294; *J. A. Kemp*, [23] 20 B. T. A. 875, and *American Locker Co.*, 21 B. T. A. 408. Within one year after the expiration of the period for assessment against the taxpayer, or on February 21, 1927, notices were mailed to the petitioners advising them of their liability under section 280 of the Revenue Act of 1926 for the deficiency previously asserted against *Leighton's, Inc.*, the taxpayer or transferor in the proceeding.

In view of the foregoing, we are of the opinion that notices were timely mailed to the petitioners as transferees, and that the action of the Commis-

sioner in seeking to collect the additional tax liability of Leighton's, Inc., for 1919 from them was correct to the extent that assets were received by them in liquidation of the said corporation. It appears, however, that in the case of one petitioner, J. H. Leighton, the amount sought to be collected is \$7,986.53, whereas the amount received in liquidation was \$900, and it follows that only the latter amount can be collected from this petitioner.

Judgment will be entered for the respondent in the amounts proposed for assessment against the petitioners, except in Docket No. 26,805 (J. H. Leighton), where judgment will be in the amount of \$900.

[24] United States Board of Tax Appeals,
Washington.

DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

DECISION.

Pursuant to the determination of the Board, as set forth in its report promulgated February 26, 1931, it is

ORDERED AND DECIDED: That the liability of the petitioner at law or in equity under the provisions of section 280 of the Revenue Act of 1926 as a transferee in respect of the tax of Leighton's, Inc., for the year 1919 is \$2,000 together with interest thereon as provided by law.

(Signed) H. F. SEAWELL,
Member.

Entered Feb. 28, 1931.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[25] Filed Mar. 9, 1931. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

Consolidated Cases of

| | |
|---------------------|--------------------|
| J. H. LEIGHTON | Docket No. 26,805, |
| J. A. McPHERSON | Docket No. 26,801, |
| R. W. CROSMAN | Docket No. 26,800, |
| G. CARRAVAS | Docket No. 26,802, |
| ELIZABETH CLARRIDGE | Docket No. 26,806, |
| R. CLEVELAND | Docket No. 26,803, |
| P. LEVINTICH | Docket No. 26,808, |
| A. RUDOLPH | Docket No. 26,864, |
| | Petitioners, |

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MOTION.

Now come the petitioners above named and move that the decision rendered by a Division of this Board in the above-entitled proceedings on February 26, 1931, be reviewed by the entire Board, and as grounds for this motion, specify the following:

1. That said decision errs in holding that the Commissioner of Internal Revenue was not bound by the factual determination of his predecessor whereby said corporation was held to be a personal service corporation and in reliance thereon filed a return on Form 1065, and the stockholders of said corporation paid a tax in conformity therewith and as required by law.

[26] 2. That said decision errs in holding that the waiver executed by said corporation was valid and not beyond the powers of the surviving trustees.

3. That said decision errs in not holding that the said waiver was invalid, for the reason that at the time the same was executed by said surviving trustees there were no assets in their hands and nothing for them to administer under the law of California, and therefore no trust relationship.

4. That said decision errs in holding that third parties, as surviving trustees of a corporation, could create a tax liability against the petitioners herein who are in no way parties to or connected with said waiver.

5. That said decision errs for other reasons set forth in the petition on file herein.

Respectfully submitted,
HERMAN WEINBERGER,
WALTER C. FOX, Jr.,
Counsel for Petitioners,
Merchants Exchange Building,
San Francisco, California.

[27] Filed Mar. 9, 1931. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

Consolidated Cases of

| | |
|---------------------|--------------------|
| J. H. LEIGHTON | Docket No. 26,805, |
| J. A. McPHERSON | Docket No. 26,801, |
| R. W. CROSMAN | Docket No. 26,800, |
| G. CARRAVAS | Docket No. 26,802, |
| ELIZABETH CLARRIDGE | Docket No. 26,806, |
| R. CLEVELAND | Docket No. 26,803, |
| P. LEVINTICH | Docket No. 26,808, |
| A. RUDOLPH | Docket No. 26,864. |

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR REVIEW OF DIVISION DECISION BY ENTIRE BOARD.

The Division opinion and decision hold that the waiver involved herein, executed by the trustees of a dissolved corporation, extended the period for the assessment of such dissolved corporation for the period of one year; and also that, based upon such extension, under Section 280 of the Act of 1926, the respondent had one year after the assessment was made within which to assess the former stockholders as transferees.

Such conclusion is based upon the theory that Section 400 of the Civil Code of California does not limit the time or period during which trustees of a dissolved corporation may function as such, and for that reason, they have authority to [28] execute waivers on behalf of a dissolved corporation. This, we submit, is contrary to the prior decisions of the Board, and also contrary to the law of California.

Manifestly, if, as will be presently shown, trustees of a dissolved corporation have no power in California to execute such waivers, or otherwise to act in the name of or on behalf of a dissolved corporation, the assessment of such dissolved corporation was void and necessarily the assessment of the transferees in this proceeding.

In *Hunt vs. Commissioner*, 15 B. T. A. 1388, it appeared that a Texas corporation had been dis-

solved and the Commissioner claimed its tax liability had not been fully discharged. More than three years after the dissolution, the former president of the corporation, who had been one of its directors, signed a consent on behalf of the dissolved corporation purporting to extend the period for the assessment of such dissolved corporation beyond the period of limitation specified in the Act of 1918.

The Board pointed out that under the Texas statute, the existence of every corporation is continued three years after its dissolution for the purpose of enabling those charged with the duties to settle up its affairs. Inasmuch as the waiver had had not been executed within the three-year period, it was held that the waiver was ineffectual to extend the period for assessment.

Particular attention is called to the fact that the statute extending the existence of a dissolved corporation three [29] years (Article 1389 of the Revised Civil Statutes of Texas 1925) is separate and apart from Article 1388 thereof which vests in the former directors of a dissolved corporation the power to settle its affairs on behalf of creditors and stockholders. Under Section 1388 the former directors are authorized to take charge of the assets of the dissolved corporation, collect outstanding debts, pay off any claims and distribute the balance remaining in their hands to the stockholders. This particular section corresponds with Section 400 of the Civil Code of California. There is not, however, in California any section or statute corre-

sponding to Article 1389 extending the corporate existence of a dissolved corporation. The decision of the Board in the Hunt Case was predicated upon the fact that under section 1388, the former officers or directors of a dissolved corporation had no authority to act for or on behalf of the corporation but only on behalf of the creditors and stockholders thereof. That is to say, to deal with the assets as individual property in their hands subject to a trust. Whatever power the former officers and directors of a dissolved corporation have in Texas to act for or on behalf of a dissolved corporation existed by virtue of Article 1389 which limited their powers in such connection to a period of three years after dissolution. Therefore, the Hunt Case emphasizes the distinction between the California law and the Texas law, and shows that had it not been for Article 1389, no act, even in Texas, by a former officer or director of a dissolved corporation could have the effect of a corporate act, and furthermore, after the expiration [30] of the three-year period, they could not, under Article 1388, act on behalf of the dissolved corporation. The decision, after referring to the fact that the waiver was given after the three-year period, and, therefore, was not within the purview of Article 1389, states:

“In every other case and under all other circumstances, it appears, we think, that the corporation is dead, at least so far as its power and therefore necessarily the power of its trus-

tees to originate new acts or enter into new agreements of any kind is concerned.”

The Hunt decision was cited by the Board with approval in *McCutchen vs. Commissioner*, 16 B. T. A. 569, and in *Union Plate and Wire Co. vs. Commissioner*, 17 B. T. A. 1229, and we know of no decision of the Board holding to the contrary. The Hunt decision is not referred to in the Division opinion, and we submit that under the prior decisions of this Board, it has been held, and correctly so, that under a section such as Section 400 of the Civil Code of California, the trustees of a dissolved corporation act solely on behalf of the stockholders and creditors with respect of property in their hands at any given time, and cannot exercise a power on the assumption that the corporate life of a dissolved corporation was continued by virtue of the existence of their powers as trustees.

The powers of trustees of dissolved California corporations are summarized in 7 Cal. Jur. 628 as follows:

“ Where a corporation has ceased to exist, neither it nor its directors can be compelled to continue to do business. The machinery of the corporation is thereupon superseded by that of the trustees in liquidation, who cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof.”

[31] Section 400 of the Civil Code, quoted at length in the Division opinion, merely sets up a trust to take and distribute the assets of a corporation at the time of its dissolution. This procedure is necessary in order to effect a distribution of the assets to the stockholders. It has no other purpose. Section 400 expressly provides that the trustees resulting from the dissolution of a corporation "are trustees of the creditors and stockholders." They are not trustees of the dissolved corporation, nor do they exercise any corporate powers whatsoever. Whatever powers they have arise from their possession of assets formerly owned by the corporation, and necessarily the *res* or subject matter of the trust consists of the assets so received and nothing more. Consequently, if, upon the dissolution of a corporation, it has no assets, there is no *res* or subject matter, and, accordingly, there is nothing upon which the power of the trustees may operate. If, upon the dissolution, the trustees receive, say, \$1,000 in property, and there are creditors having claims of \$1,000, necessarily, the power of the directors to settle such claims is limited to the value of the assets in their hands. They have no power or authority to impose assessments or charges upon the stockholders whom they may not even know, and there is obviously no privity of contract between them, and furthermore, the corporate powers of the corporation die with it, and the directors have no authority perforce of such dead corporate powers, to enlarge the trust beyond the assets in their hands.

[32] Furthermore, the State has no interest after the dissolution of a corporation in its assets, or otherwise, except in so far as the equitable jurisdiction of the courts imposes a duty upon trustees of an express trust to honestly discharge their duties.

In *Havemeyer vs. Superior Court*, 84 Cal. 327, it was held that where a corporation is forced to dissolve pursuant to *quo warranto* proceedings, immediately upon the dissolution the State loses all interest in the assets and affairs of the former corporation. In that case the proceeding was commenced in order to break up an illegal monopoly, and it was therein held that the possibility that the trustees might attempt to continue the monopoly did not justify an extension of the rule. Quoting from page 378 of the decision:

“ When a corporation is dissolved, its property, as we have seen, vests in its stockholders, subject only to the claims of creditors, and is thereafter held upon the same tenure and subject to the same conditions as similar property owned by other natural persons. What others may do they may do. They owe no further or higher duty to the public, and are under no other restraints. Therefore, unless some ground can be shown upon which the state can take a sugar refinery away from a private citizen who has inherited it, or bought it, or built it, and can shut it up preparatory to dividing and scattering it, upon

the ground that he has entered into an agreement with some other private citizen owning another refinery, to limit the output of both establishments with a view to keeping up the price of the refined product, no ground can be shown which will warrant the state in taking similar property from natural persons who have succeeded thereto on the death of a corporation.”

In *State I. & I. Co. vs. San Francisco*, 101 Cal. 135, at 149, it was held that when a proceeding has been completed against a corporation to take away its franchise, and that [33] result has been accomplished, the court has no further action to perform in the matter.

“The state has no interest in either the assets of the corporation or its debts, and when it has secured the dissolution of the corporation its functions in the action have ceased.”

It will be particularly noted from the foregoing decisions that it has been held in this State that immediately upon the dissolution, the beneficial interest in the assets of a corporation vests in the former stockholders subject only to the powers of the trustees to pay debts and to convert the assets to facilitate distribution. Beyond that the trustees have no power, and consequently may not go.

In *Lewis vs. Miller & Lux*, 156 Cal. 101, it was held that upon the forfeiture of the charter of a California corporation for nonpayment of license tax, the corporate existence ended immediately, and the directors took charge of the assets as trustees

for the creditors and stockholders under Section 400 of the Civil Code; and neither the corporation nor the directors could be compelled to do business by reissuing stock transferred from one of its stockholders to another. The holders of the stock have a right to participate in the division of the corporate assets, but the

“machinery of the corporation has been superseded by that of the trustees in liquidation, and they cannot be allowed or required to perform further functions in their capacity as a corporation or as directors thereof.”

In *Crossman vs. Vivienda Water Co.*, 150 Cal. 575, an action was commenced against a dissolved corporation and a default [34] judgment entered therein. At the instance of a former stockholder, said default judgment was set aside upon the ground that no action could be maintained against or in the name of a corporation after its dissolution. In other words, there was no corporate entity, no corporate name and no corporate powers from and after the date of its dissolution.

In the Crossman Case the court called particular attention to the distribution between the law as set forth in Section 400 of the Civil Code of California, and the law of other states. It mentioned the fact that in other states, after the dissolution of a corporation its existence as a legal entity is continued for a period of time (such as provided for in Article 1389 of the Statutes of

Texas), so as to enable the trustees to conduct business as a corporate entity and in a corporate name until such time as its affairs are completely wound up. In said case the court held that such rule had no application in California, and that the authority of trustees under Section 400 of the Civil Code did not authorize them to do business as a corporation or to act otherwise than as representatives of the stockholders in the matter. Emphasizing the distinction between the law of California and that of other states in this respect, the court said:

“ We have no statute similar to that of several states, providing that in the event of the dissolution of a corporation its existence shall be continued either indefinitely or for a specified time for the settlement of its affairs.”

In *Newhall vs. Western Zinc Min. Co.*, 164 Cal. 380, a dissolved corporation sought to answer a legal proceeding commenced [35] against it, and judgment was rendered therein without disclosing the fact that the corporation had been dissolved. Thereafter a former stockholder moved to set aside the judgment on the ground that the corporation was dissolved at the time the action was commenced, and, therefore, the proceeding could not be maintained. The court held that the judgment rendered in such action was absolutely void. In other words, Section 400 of the Civil Code authorizes creditors to sue the trustees of a dissolved corporation to enforce creditors' claims in the assets, which

action may be maintained by the creditors against the trustees by virtue of the fact that the trustees are in control of the express trust measured by the assets in their hands. The action has nothing whatever to do with the former corporate entity and may not be maintained in the corporate name, and the recovery is limited by and dependent upon the existence of assets or trust property in the hands of the surviving trustees.

The record herein shows without contradiction that the trustees of the corporation here involved has no assets in their hands subsequent to its dissolution. That is to say, immediately upon the dissolution of the corporation in 1920, the assets were forthwith distributed to the stockholders. Consequently, there was no trust *res* or subject matter at any time subsequent to 1920. The assessment relied upon by the respondent herein was made against the dissolved corporation in September, 1925, at which time there were no assets in the trust, and consequently, no trust, for there can be none without [36] a subject matter.

In conclusion, therefore, we submit that the decision of the Division is erroneous, first, because the decisions of California under Section 400 of the Civil Code do not authorize the trustees of a dissolved corporation to act for or in behalf of the dissolved corporation, but only with reference to the assets they hold as trustees for the creditors and stockholders, and since the waiver given in this case was given in the name of the dissolved corporation and to extend the time for the com-

pletion of a corporate act, it follows that it is invalid under the decisions of California, and also invalid under the rule of the case of Hunt vs. Commissioner decided by this Board. Furthermore, since the powers of trustees of an express trust depend upon the existence of a *res* or subject matter of a trust, and are limited thereby, and in this particular case the trustees had no property in their hands subsequent to the year 1920, it follows that there was no trust and the trustees were unauthorized to act in any manner whatsoever.

For the foregoing reasons we submit that the decision of the Division should be reversed by this Board and reversed because it is contrary to the rule enunciated in Hunt vs. Commissioner, *supra*.

We desire to add that the equity in this case is with the petitioners and not with the respondent. The corporation in good faith filed its return for 1919 as a personal service corporation, and the stockholders—many of whom have left California—took up in their own returns their distributive shares [37] of the income of the corporation for that year. Said income is, therefore, tax paid. The Commissioner in office at the time accepted the personal service classification, and at that time there was no procedure for closing agreements, hence the decision of the predecessor administrative officer is binding upon his successor. Not until many years after the corporation had been dissolved and forgotten did the successor reverse the determination of his predecessor, and not only

that, when he did so, it was entirely impossible to get in touch with all the stockholders and establish the amount of the tax theretofore paid under the personal service classification. Such stale demand should be discouraged, and since this proceeding is equitable in character, it follows that the intendments of the law should be resolved in favor of the taxpayer. Under the doctrine of the Hunt Case, as well as under the decisions of the Supreme Court of California, the waiver given herein by the trustees of the dissolved corporation was invalid, and for that reason no liability of the transferees herein can, or in equity should, be predicated thereon.

We have not argued herein the remaining points in the petition, since we believe that they are fully covered by the brief heretofore filed.

Respectfully submitted,
HERMAN WEINBERGER,
WALTER C. FOX, Jr.,
Counsel for Petitioners,
Merchants Exchange Building,
San Francisco, California.

[38] United States Board of Tax Appeals, Wash-
ington.

DOCKET Nos. 26,800, 26,801, 26,902, 26,803, 26,-
805, 26,806, 26,808, 26,864.

R. W. CROSMAN,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

G. CARRAVAS,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

R. CLEVELAND,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

J. N. LEIGHTON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ELIZABETH CLARRIDGE,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

P. LEVINTICH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

A. RUDOLPH,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

ORDER DENYING MOTION.

The petitioners having moved that the findings of fact and opinion rendered by a division of the Board in the above-entitled proceedings on February 26, 1931, be reviewed by the entire Board, and having submitted in support an agreement and memorandum of authorities, said motion and memorandum having been duly considered, it is

ORDERED: That said motion be and the same is hereby denied.

(Signed) LOGAN MORRIS,
Chairman.

Dated, Washington, D. C., March 12, 1931.

A true copy.

[Seal] Teste: B. D. GAMBLE,
Clerk U. S. Board of Tax Appeals.

[39] Filed June 9, 1931. U. S. Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PETITION FOR REVIEW OF DECISION OF
THE UNITED STATES BOARD OF TAX
APPEALS.

Now comes the above-named petitioner in the above-entitled proceeding before the United States Board of Tax Appeals, and as petitioner and appellant herein, respectfully prays for a review of the decision of said United States Board of Tax Appeals by the United States Circuit Court of Appeals for the Ninth Circuit, and hereby appeals from

said decision of said Board of Tax Appeals to said Circuit Court of Appeals.

I.

NATURE OF THE CONTROVERSY.

In this proceeding the respondent sought to impose upon the petitioner, as transferee of Leighton's, Incorporated, a dissolved California corporation, under Section 280 of the Revenue Act of 1926, income and profits taxes claimed to be due from said dissolved corporation for the taxable year 1919. The questions before said United States Board of Tax Appeals [40] involved, first, whether a waiver executed by the former trustees of a dissolved California corporation binds in any way the former stockholders of such dissolved corporation so as to authorize the assessment and collection of said taxes from them as transferees after the period for the assessment and collection of said taxes had expired by limitation; second, whether Section 280 of the Act of 1926 may be retroactively applied because an assessment was made against such dissolved corporation prior to its enactment; and, third, whether the proceedings against either the dissolved corporation or the petitioner, as such transferee, are not both barred and extinguished by the applicable provisions of the several revenue acts.

II.

STATEMENT OF THE FACTS.

In June, 1919, Leighton's, Incorporated, a California corporation, opened a dairy lunch in Oak-

land, California, and operated the same on a co-operative plan during the remainder of that year. Under the California law no provision could be inserted in the articles of incorporation of said corporation to compel employees retiring from the business to sell their stock interest therein to successors so as to preserve the co-operative plan of the enterprise, and accordingly, steps were taken to effect its dissolution to the end that the enterprise might be reorganized upon other lines which would preserve its co-operative features. Pending such dissolution, the assets and business were [41] sold for \$15,000.

On March 15, 1920, Leighton's Incorporated filed with the Collector of Internal Revenue at San Francisco a return for Federal income and profits tax purposes for the year 1919, in which it set forth the amount of its gross income, deductions and the net income. Said return was upon Form 1065, and the corporation claimed personal service status under Section 218 of the Revenue Act of 1918. Also in said return there was set forth a list of the stockholders and the distributive interest of each, as well as the proportion of the net earnings for that year of each such stockholder, and the net earnings were taken up in accordance with Section 218 for purposes of the tax and the individual returns of such stockholders. Said return was accepted by the then Commissioner of Internal Revenue as a compliance with the provisions of the Revenue Act of 1918 by said corporation, and it was noted upon the records of the Internal Revenue Department that no tax was due from said cor-

poration for said year. Such determination was not challenged until a successor Commissioner, David H. Blair, had replaced the Commissioner in office at the time said return was filed and accepted by the Internal Revenue Department.

After the sale of said assets, no reason existed for maintaining the corporation, and on June 25, 1920, pursuant to a decree of the Superior Court of this state, it was dissolved, and the cash on hand, being its only asset, was distributed to the several stockholders upon the basis of their *pro rata* ownership [42] of the stock. This petitioner received \$2,000.

In 1923 Commissioner Blair, the successor Commissioner, addressed a letter to the dissolved corporation indicating an intention to dispute its right to personal service classification and to assess it at the graduated rates specified in the Act of 1918. Upon receipt of that letter certain of the creditors and stockholders of the dissolved corporation protested the disallowance of personal service status and employed counsel to present their views at a conference in the Treasury Department. Such conference was held in 1923 without success.

Prior to March 15, 1925, which was five years after the return was filed, the Commissioner sent a waiver to the dissolved corporation and requested that the same be executed so as to extend the time for the assessment of the additional tax for the year 1919 until December 31, 1925, or until sixty days thereafter in the event an assessment were made prior to that time. There being no corpora-

tion and no one available to execute the waiver in its behalf, the Commissioner was so notified and there was furnished to him at the time a waiver signed

“LEIGHTON’S INC., a dissolved
Corporation, Taxpayer,
By J. H. LEIGHTON,
JAS. A. McPHERSON,
CARL BARTHEL,
Surviving Trustees.”

Thereafter and on or about November 26, 1925, Commissioner Blair sent a sixty-day letter to said dissolved corporation proposing for assessment a tax of \$7,986.53, based upon his [43] determination that such personal service status should be disallowed. Since the corporation at that time had been out of existence for some five years, no proceedings could be taken on behalf of said dissolved corporation and nothing was accordingly done with reference to said proposal of the Commissioner. After December 31, 1925, and in January, 1926, said tax was assessed against said dissolved corporation.

Thereafter nothing further was done until the enactment of the Revenue Act of 1926 containing in Section 280 the administrative procedure for the summary assessment of transferees of property of dissolved corporations. On February 21, 1927, a sixty-day letter was sent to the petitioner herein seeking to collect from him the sum of \$2,000 as representing his liability at law or in equity for taxes claimed to be due from such dissolved corpora-

tion for the calendar year 1919. The Board of Tax Appeals upheld the proposal of the respondent, declaring that the waiver executed by said surviving trustees was effective to extend the time for the assessment of petitioner as such transferee under the Act subsequently adopted, and furthermore, that neither the period of limitations nor the extinguishment of the liability with respect of the corporation barred in any way the collection of such tax from the petitioner as such transferee.

III.

ASSIGNMENTS OF ERROR.

The United States Board of Tax Appeals erred in its decision herein in each of the following respects and for each [44] of the following reasons, viz.:

1. In holding that a waiver of the period of limitations for the assessment of additional income or profits taxes for the taxable year 1919, under the Revenue Act of 1918, executed by trustees of Leighton's Inc., a dissolved California corporation, extended the period for the assessment and/or collection of such taxes from said dissolved corporation or its stockholders, as transferees or otherwise.

2. In holding that a waiver of the period of limitations for the assessment of additional income or profits taxes for the taxable year 1919, under the Revenue Act of 1918, executed by trustees of Leighton's Inc., a dissolved California corporation, in any way affects or binds the former stockholders of said corporation so as to fasten upon them, or

any of them, liabilities for such taxes or to authorize or permit proceedings against any of such former stockholders, as transferees, under Section 280 of the Revenue Act of 1926, or otherwise.

3. In holding that this proceeding was not barred by Section 250 (d) of the Revenue Act of 1918, Section 277 (a) (2) of the Revenue Act of 1924, and Sections 277 (a), 280, 1106 (a) and 1109 of the Revenue Act of 1926.

4. In holding that Section 280 of the Act of 1926 may be retroactively applied on the basis of an assessment made during the period of said purported waiver against said dissolved corporation.

5. In holding that said assessment, if valid, did not constitute a proceeding pending for the enforcement of a tax [45] liability at the time of the enactment of the Revenue Act of 1926 so as to exclude petitioner from the provisions of, and any liability under, Section 280 of said Act.

6. In refusing to consider and refusing to hold that said proposal to assess and/or assessment of petitioner does not deny petitioner due process of law and the equal protection of law, and deprive petitioner of property without due process of law, by and through the retroactive interpretation and application of said Section 280, contrary to the Fifth Amendment of the Constitution of the United States.

WHEREFORE, petitioner and appellant respectfully prays for a review of said decision of said United States Board of Tax Appeals by the United States Circuit Court of Appeals for the

Ninth Circuit, and that upon such review said Circuit Court of Appeals for the Ninth Circuit will reverse said decision of the United States Board of Tax Appeals.

Dated, May 29, 1931.

Respectfully submitted,
HERMAN WEINBERGER,
WALTER C. FOX, Jr.,
Attorneys for Petitioner and Appellant.

[46] State of California,
City and County of San Francisco,—ss.

Herman Weinberger, being first duly sworn, deposes and says:

That he is the attorney for the petitioner and appellant above named; that he has read or had the foregoing petition read to him, and is familiar with the statements therein contained, and that the facts therein stated are true, except as to those facts stated to be upon information and belief, and that as to those facts he believes them to be true.

HERMAN WEINBERGER.

Subscribed and sworn to before me this 29th day of May, 1931.

[Notarial Seal] LILLIAN RALSTON,
Notary Public in and for the City and County of
San Francisco, State of California.

My commission expires March 27, 1932.

[47] Filed Jun. 9, 1931. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

NOTICE RE FILING OF PETITION FOR RE-
VIEW.

To C. M. Charest, General Counsel, Bureau of Internal Revenue:

Notice is hereby given that in the above-entitled cause there is being filed to-day with the Board of Tax Appeals a petition for review by the United States Circuit Court of Appeals for the Ninth Circuit.

Dated, June 9, 1931.

HERMAN WEINBERGER,
WALTER C. FOX, Jr.,

Attorneys for Petitioner and Appellant.

Service acknowledged this 9th day of June, 1931.

C. M. CHAREST,
General Counsel,

Bureau of Internal Revenue.

[48] Filed Jul. 22, 1931. United States Board of Tax Appeals.

Before the United States Board of Tax Appeals.

DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

PRAECIPE FOR TRANSCRIPT OF RECORD
ON APPEAL.

To the Clerk of the United States Board of Tax Appeals, Washington, District of Columbia:

Sir: Please prepare and transmit to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, in accordance with Rule 38 of said Circuit Court of Appeals, as the record in the above-entitled cause, duly certified copies of the following entries, records, documents and other papers:

1. Docket entries of all proceedings before the above-named United States Board of Tax Appeals.

2. Petition filed with said United States Board of Tax Appeals and amendments thereto.

[49] 3. Answer to said petition and amendments thereto.

4. Findings of fact, opinion, and decision of the Board including motion for review by entire Board and order of denial thereof.

5. Petition for review by the United States Circuit Court of Appeals for the Ninth Circuit.

6. Notice of appeal.

7. This praecipe.

Dated July 22, 1931.

HERMAN WEINBERGER,

WALTER C. FOX, Jr.,

Attorneys for Petitioner and Appellant.

Service acknowledged this 22d day of July, 1931; no objection to praecipe will be filed.

C. M. CHAREST,

General Counsel, Bureau of Internal Revenue.

[50] DOCKET No. 26,801.

J. A. McPHERSON,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

CERTIFICATE OF CLERK U. S. BOARD OF
TAX APPEALS TO TRANSCRIPT OF
RECORD.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages 1 to 49, inclusive, contain and are a true copy of the transcript of record, papers and proceedings on file and of record in my office as called for by the praecipe in the appeal as above numbered and entitled.

IN TESTIMONY WHEREOF, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 28th day of July, A. D. 1931.

[Seal]

B. D. GAMBLE,
Clerk.

[Endorsed]: No. 6550. United States Circuit Court of Appeals for the Ninth Circuit. J. A. McPherson, Petitioner, vs. Commissioner of Internal Revenue, Respondent. Transcript of Record. Upon Petition to Review an Order of the United States Board of Tax Appeals.

Filed August 3, 1931.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

